

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 5TH NOVEMBER 2007 / 14TH KARTHIKA 1929

RSA.No. 382 of 2003(D)

**AS.37/1992 of SUB COURT,ATTINGAL
OS.229/1989 of PRL.MUNSIFF COURT,NEDUMANGAD**
.....

APPELLANT/APPELLANT/PLAINTIFF

**PONNAMMA MEENAKSHY,
THEKKAKUNJU VEEDU, MUTTADA, CHERIAMANNARA MURI,
CHETTIVILAKOM VILLAGE, THIRUVANANTHAPURAM FROM
PUTHEN VEEDU, THEVALACAUD, KIZHAKKUMKARA MURI,
MANICKAL VILLAGE.**

**BY ADV. SRI.K.DIVAKARAN NAIR
SRI.K.P.RAJEEVAN**

RESPONDENTS: RESPONDENTS/DEFENDANTS

- 1. PADMANABHAN ASARI, PUTHEN VEEDU,
THEVALACAUD, KIZHAKUMKARA MURI,
MANICKAL VILLAGE, NEDUMANGAD TALUK.**
- 2. PARVATHY PONNAMMA, -DO- -DO- -DO-**
- 3. PONNAMMA RAJAMMA, -DO- -DO- -DO-**
- 4. PONNAMMA RADHA, -DO- -DO- -DO-**
- 5. PONNAMMA SUSEELA, -DO- -DO- -DO-**
- 6. PONNAMMA LALITHA, -DO- -DO- -DO-**
- 7. PONNAMMA OMANA, -DO- -DO- -DO-**
- 8. PONNAMMA RETNAMMA, -DO- -DO- -DO-**
- 9. PONNAMMA SOBHANA, -DO- -DO- -DO-**

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**10. LEELAVATHY AMMA, D/O.KRISHNA PILLAI,
LEELA BHAVAN, VEMPAYAM, THEVALACAUD
DESM, MANICKAL VILLAGE, NEDUMANGAD TALUK.**

**11. VASANTHA, D/O.KRISHNA PILLAI,
-DO- -DO- -DO-**

**12. BINDU, W/O.DHANESH KUMAR, JWALA GIRI,
137/3, AMBALAMUGHAL, ERNAKULAM.**

BY ADV. SRI.P.CHANDRASEKHAR

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 05/11/2007, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:**

M.SASIDHARAN NAMBIAR, J.

.....
R.S.A.No. 382 OF 2003
.....

DATED THIS THE 5th DAY OF NOVEMBER, 2007

JUDGMENT

Plaintiff in O.S.229 of 1989 on the file of Munsiff Court, Nedumangad is the appellant. Defendants are respondents. Appellant instituted the suit seeking declaration of title and injunction. Plaint schedule property originally belonged to first respondent as per partition deed of 1102. First respondent created a mortgage in respect of plaint schedule property for Rs.250/- in favour of respondents 2 to 5 who allegedly sub-mortgaged the property for Rs.200/- in favour of appellant. Appellant claims that she has been in possession of the property since then and the building in the plaint schedule property had collapsed and appellant has been in possession of the property since 1955 and in 1973, respondents 1 to 5 filed a collusive suit and obtained a decree for redemption and first respondent came to the property for taking delivery and then only appellant was aware of the decree in O.S.196 of 1973. It was contended that appellant was not made a party to the suit and therefore the decree is not binding on her and being a sub-mortgagee, the decree obtained by first respondent against the original

mortgagees is not binding on her and on the strength of that decree, appellant cannot be dispossessed. A decree to that effect was sought for.

2. First respondent resisted the suit contending that appellant is claiming a mortgage right under an unregistered mortgage deed and the property was never in the possession of appellant and continued to be in the possession of respondents 2 to 5 and appellant has not made any improvements therein and she is not a necessary party in O.S.196 of 1973 and that was not a collusive suit and the suit was originally dismissed, which was challenged by first respondent in A.S.3 of 1977 and a decree for redemption was granted which was challenged by respondents 2 to 5 before this court in S.A.1185 of 1979 and the second appeal was dismissed and thereafter a final decree application was filed and it was allowed in 1980 and an execution petition was filed against respondents 2 to 5 and in such circumstances, the case that it is a collusive decree is not correct. It was also contended that appellant is the daughter of second respondent mortgagee and no sub-mortgage was created in her favour and there was no mortgagor-mortgagee relationship between appellant and respondents 2 to 5 and the suit is therefore only to be dismissed.

3. Learned Munsiff, on the evidence of Exts.A1 and A2 and Exts.B1 to B3, dismissed the suit holding that the decree in O.S.196 of 1973 is binding on appellant and appellant is not entitled to the declaration sought for. Appellant challenged the decree and judgment before Sub Court, Attingal in A.S.37 of 1992. Learned Sub Judge, on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

4. Learned counsel appearing for appellant was heard. The argument of the learned counsel is that under Rule 1 of Order XXXIV of Code of Civil Procedure, in a suit for redemption of mortgage, the mortgagor is required to implead the sub-mortgagee as a party and even though Ext.A2 mortgage was executed by the mortgagee under Ext.A1 in 1955, appellant, sub-mortgagee was not impleaded in O.S.196 of 1973 and therefore the decree is not valid and binding on her and courts below should have granted the decree sought for. Learned counsel, relying on the Full Bench decision of this court in **Maheśwaradhathan Nambudiri V. Narayanan Nambudiri** (1970 KLT 313) and the Division Bench decision in **Bharathi & others V. Ayissa Umma** (1970 KLT 384), argued that courts

below omitted to take note of the said decisions and as sub-mortgagee was not impleaded in the suit, the decree in O.S.196 of 1973 is not valid and binding on appellant.

5. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. O.S.196 of 1973 was instituted by first respondent for redemption of Ext.A1 mortgage against respondents 2 to 5, the mortgagees. Evidenced by Ext.B1, the suit was contested by the mortgagees and was dismissed. First respondent challenged the decree before Sub Court, Attingal in A.S. 3 of 1977. Ext.B2 establishes that in 1979, first appeal was allowed and a decree for redemption was granted. Ext.B3 further establishes that the said judgment was challenged before this court in S.A.1185 of 1979 and this court finally confirmed Ext.B2 judgment on 8.3.1985. It is also not disputed that pursuant to Ext.B3 judgment, a final decree was passed and in execution of the decree, first respondent has taken steps to take delivery of the property. The present suit was filed at that juncture. It is to be borne in mind that Ext.A2 mortgage under which appellant claims right over the property was allegedly executed in 1955 in favour of appellant, a minor girl and that too, the daughter of one of the mortgagees under

Ext.A1. Trial court and first appellate court on the evidence found that even though O.S.196 of 1973 was contested by the mortgagees, no contention was raised that there was a sub-mortgage or that possession of the mortgage property was with the sub-mortgagee. Instead it was proceeded on the basis that property is in possession of the mortgagees. Trial court and first appellate court, on the evidence, entered a factual finding that appellant, sub-mortgagee, who was minor at that time, did not obtain possession of the property. That finding of fact cannot be interfered in exercise of the powers of this court under Section 100 of Code of Civil Procedure, especially when even appellant was not examined before the court below.

6. True, under Rule 1 of Order XXXIV, in a suit for redemption, a sub-mortgagee is required to be made a party. It is also true that a redemption effected in a suit brought by mortgagor against the mortgagee, without the sub-mortgagee on the party array is effective so far as the mortgage is concerned and cannot affect the rights of mortgagee. But it is not the law that a decree obtained without the sub-mortgagee in the party array is a nullity. If the mortgagor was unaware of the sub-mortgage and there was no notice of the sub-mortgage on the

mortgagor, then the decree passed against the mortgagee, even without the sub-mortgagee as a party, will be binding not only on the mortgagee but the sub-mortgagee also. The Full Bench decision of this court in Maheswaradhathan Namboodiri's case (supra) has settled the position. The Full Bench held:-

“ 16. A sub-mortgage being in the nature of an assignment of the mortgage, the principle underlying the proviso to subsection(1) of section 130 of the Transfer of Property Act(which is only a codification of the pre-existing law) has always been applied to the case of a redemption of a mortgage by the mortgagor without the conjunction of the sub-mortgagee. The express notice contemplated by the proviso is not insisted upon - the section is, of course, not in terms

applicable - but if the redemption be without notice of the sub-mortgage, lien it is valid and effective as against the sub-mortgage, and it is settled law that the mere registration of the sub-mortgage is not notice thereof to the mortgagor since by the redemption, he does not acquire the property transferred under the sub-mortgage or any part thereof - see Explanation I of what might be called the definition of "notice" in section 3 of Transfer of Property Act.

17. In the present suit there is nothing to show that either the Chelamanna Mana, the original mortgagor, or its successor, the 3rd defendant had notice of this

sub-mortgage, Ext.A1, under which the plaintiffs claim, at the time the 3rd defendant redeemed the mortgage, Ext.B12. Indeed there is not even an averment to that effect”.

7. In the light of the legal position when the mortgagees under Ext.A1 did not even raise a plea in the earlier suit that there is a sub-mortgage and there is no case for appellant that there was no notice on first respondent mortgagor, that there was a submortgage in favour of the minor daughter of one of the mortgagees, decree cannot be challenged by appellant on the ground that she was not made a party, and decree is binding on the appellant also. There is no merit in the appeal.

Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR, JUDGE

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M.SASIDHARAN NAMBIAR, J

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JUDGMENT

5.11.2007